

No. 20273

IN THE
**United States Court of Appeals
For the Ninth Circuit**

EMPLOYERS MUTUAL LIABILITY INSURANCE COMPANY
OF WISCONSIN, a corporation,
Appellant,

v.

PACIFIC INLAND NAVIGATION COMPANY, INC.,
a corporation, as successor to
Inland Navigation Company,
Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE WESTERN DISTRICT OF WASHINGTON,
SOUTHERN DIVISION

HONORABLE GEORGE H. BOLDT, *Judge*

REPLY BRIEF OF APPELLANT

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REPLY BRIEF OF APPELLANT

I

**REPLY TO APPELLEE'S COUNTER-STATEMENT
OF THE CASE**

Appellant accepts the first two pages of appellee's counter-statement in their entirety (Answering Brief, pp. 1, 2). However, on page 3, appellee states that, following preliminary ruling, the trial was reopened at the request of appellant. Not so. The trial was reopened at the request of the court to receive appellee's offer of parol evidence in the event of review (Tr. 56).

**ANSWER TO APPELLEE'S ARGUMENT IN SUPPORT
OF FINDINGS OF FACT, CONCLUSIONS OF
LAW AND JUDGMENT**

Appellant readily accepts appellee's general statements applicable to findings of fact, but questions the applicability of certain rules to the case at bar.

For example, it is correct that the evidence must be viewed in the light most favorable to the prevailing party (*Axelbank v. Rony*, CA 9, 1960, 277 F.2d 314, 316) and that findings "cannot be upset if they are supported by substantial evidence." *Pacific Queen*, (CA 9, 1962), 307 F.2d 700, 706.

But, *unlike Puget Sound Pulp and Timber Co. v. O'Reilly*, (CA 9, 1956), 239 F.2d 607, 609, (wherein the question arose as to whether a telephone conversation resulted in the modification of an agency agreement) and *Gypsum, Inc. v. Handlesman*, (CA 9, 1962), 307 F.2d 525, 529 (a seaman's libel for maintenance, cure and negligence under general maritime law and the Jones Act), here the evidence was undisputed, uncontroverted, unassailed. Accordingly, this court is not asked to weigh the evidence and substitute its judgment for that of the trial court. Rather, the court is asked to apply the applicable law to the undisputed evidence.

Specification of Error No. 1, pertaining to appellant's objections to Finding of Fact 7, is said (Answering Brief, p. 5) to be supported by the leases themselves (Ex. C to F and Stipulation as to Record on Appeal 9, R. 83-84).

Appellant disagrees. The dock (Ex. C, p. 2, ¶ 1(a); Ex. D, E, F) was just as much a topic and subject of the leases as was the so-called “tank-farm” and was an integral part of the leased premises, to wit: “a bulk petroleum terminal” (Ex. C, p. 1) and was so used (Tr. 17, ll. 20-22; Tr. 40, ll.1-15; Tr. 42, ll. 8-17; Tr. 43, l. 16-Tr. 44, l. 2; Tr. 124, l. 8-Tr. 125, l. 7). In short, if the dock was not “leased,” neither was the “tank-farm.” Both were a part of the bulk petroleum terminal and one used to complement the other, notwithstanding that the description of the premises contained in the lease does not include the dock. The consideration supporting the leases was not divided, or apportioned.

But whether the dock was or was not “leased” does not appear important unless “leased” means the same thing as “rented,” because the latter is the language of Exclusion (f) (Ex. A).

Appellant claims that appellee’s “use” and “occupancy” of the destroyed dock arose out of its “rental” of the dock under the long term leases and that the trial court should have so decided as a fact when requested so to do (R. 46, ¶ 6(a)).

Under “Specification of Error No. 2” pertaining to Finding of Fact 7, appellee claims that paragraph 7 of pre-trial order (R. 29-30) supports the finding. But appellee overlooks the qualifying and limiting clause contained in the pre-trial order:

“The use of the Port of Pasco dock by plaintiff and its predecessor or subsidiary companies prior

to and on December 15-16, 1958, was a non-exclusive use *in the sense that said dock could be used by companies or operators to (sic) the Inland Navigation Company and its subsidiaries when portions of the dock were not occupied by vessels and barges of Inland Navigation Company and its subsidiaries* . . .

Finding of Fact 7 is not so limited and there is absolutely no evidence that anyone other than appellee's predecessor had the right to use or was using the dock at the time of loss.

Moreover, appellee's officer (Light) testified that he did not have any knowledge that anyone other than appellee's predecessor ever used the dock (Tr. 45, l. 25; Tr. 46, l. 4) and Barge 535 was wholly occupying the dock at the time of loss (Tr. 46, ll. 5-7). Walls could remember occasions when sport-boaters used the dock (Tr. 111, l. 25-Tr. 112, l. 11), but nothing specific as to time.

In short, appellee apparently claims that, because others might have used and have been authorized to use the destroyed dock when it was not used by appellee's predecessor, the dock was not "used by the insured" at the time of the loss as defined in Exclusion (f), Exhibit A. This logic is, of course, fallacious, but here again, it should make no difference that appellee's use of the dock was "non-exclusive." If, as all of the evidence shows, appellee in fact "used" the dock at the time of loss, Exclusion (f) (2) should have applied to exclude coverage unless such exclusion was deleted, amended or otherwise superseded by some other endorsement. The

trial court should have so found as it was requested to do in the pre-trial order (R. 46, ¶ 6 (c)).

Concerning Specification of Error No. 3, appellee argues that Finding of Fact 18 is supported by the testimony of Mr. Walls (Tr. 67-135) offered by appellee in support of its offer of proof (R. 54, Tr. 4, l. 16-Tr. 7, l. 25) received over appellant's objection (Tr. 74, l. 21-Tr. 75, l. 2). Appellee also says that "Mr. Frederickson, who testified at the trial, admitted that Endorsement 23 to the policy spoke in positive and specific terms to provide coverage on risks of unloading water craft and that 'the wording does not have any limitation built into the paragraph as such'" (Tr. 158, ll. 6 to 15) (Br., pp. 7, 8). True, that Frederickson responded affirmatively to appellee's leading question and stated as quoted, but such is further subject to Mr. Frederickson's further explanation (Tr. 159, ll. 5-16) that coverages "A" and "C" extended by Endorsement 23 "are still subject to the exclusions that are found in the basic contract" and that "It is not necessary to refer to the exclusions again" in the endorsement.

Appellee argues that, since the fire damage to the dock resulted in liability of appellee's predecessor to a "third party" (Br. 8) and "Endorsement 23 was insisted upon and eventually added to the policy to cover third party liability risks" (Br. 7), therefore, appellant is liable to appellee.

(Parenthetically, it is significant to note that throughout its brief appellee speaks of "third party liability risks"

(Br., pp. 3, 7, 8, 15) and “risk of liability for third parties” (Br. 13), and carefully avoids mentioning the applicability of Exclusion (f) to the specific property destroyed.)

This argument assumes that the *liability* insurance contract covers *all* property owned by “third parties” whether such property is “occupied by or rented to the insured, or (2) . . . property used by the insured, or (3) . . . property in the care, custody or control of the insured or property as to which the insured for any purpose is exercising physical control . . .” (all excluded from coverage under Exclusion (f), Ex. A), and notwithstanding the fact that the insurance contract neither defines nor mentions “third party liability risks” nor “liability to a third party” nor even “third party.” The policy speaks in terms plain, clear and unambiguous, *excluding* from covered certain property *owned by* so-called “third parties” which is “occupied by, rented to, used by, under the care, custody and control of, the named insured and as to which the insured is exercising actual physical” even though the insured could be liable to the owner for the loss thereof.

In its Memorandum Decision and Order (Tr. 59) the trial court observed, “Exclusion (f) appears to have been intended to exempt from coverage of the policy property properly insurable under fire and extended coverage.” This conclusion is carried forward in Finding of Fact 16 (R. 68, ll. 9-11) and is one which is correct, as far as it goes. But the plain language of Exclusion (f) con-

templates excluding more than just property insurable under fire and extended coverage insurance. It contemplates property which may be insurable under *any other* form of insurance (Tr. 109, ll. 16-19) or which may not be insurable at all.

Appellee knows that it was exclusively “occupying, renting and using the dock at the time of loss and that the dock was under appellee’s care, custody and control and property as to which appellee was exercising actual physical control” at the time of loss, all as excluded from coverage under Exclusion (f), Exhibit A.

In order to *avoid* the exclusion appellee asserted a two-pronged approach:

1. Exclusion (f), Exhibit A, was superseded or deleted by implication by Endorsement 23, coverage under the latter being plain, clear and unambiguous (R. 41, ¶ 7) (Br. 8, 9).

But the trial court repeatedly rejected this contention (R. 53, Tr. 8; R. 58, Conclusion of Law 3; R. 73) and properly so in view of Mr. Wall’s testimony (Tr. 108, 115, l. 24-Tr. 116, l. 2; Tr. 117, ll. 10-25).

2. If Endorsement 23 did not specifically provide coverage for the dock, then the insurance contract was at least ambiguous and open to parol evidence in aid of construction (Tr. 4, ll. 1-3).

Appellee has yet to point out wherein the insurance contract as a whole (including Endorsement 23) is ambiguous, although the trial court thought it was (Tr. 56,

ll. 8-10) but later changed its mind (Conclusion of Law 3, R. 73).

Appellee merely suggests that Exclusion (f) be ignored and forgotten because, after all, Mr. Walls wanted to insure all property owned by "third parties," whether such property was otherwise excluded under Exclusion (f) or not. That Mr. Walls did not fully comprehend the provisions of Exclusion (f) is obvious from his testimony (Tr. 109, l. 10-Tr. 111, l. 11; Tr. 113, ll. 7-TR. 129).

Thus, notwithstanding Conclusion of Law 3 (R. 73), that the pertinent policy provisions are unambiguous, the court received and relied upon parol evidence (solely Mr. Wall's) to declare coverage and impose liability upon appellant.

Appellee suggests that the court was entitled to do so because provisions of an insurance policy are construed most strongly against the insurer (Br. 9). While that proposition may be "hornbook law" it is not the general law, nor is it the law of Washington which appellee admits is applicable.

In *St. Paul Mercury Insurance Co. v. Price*, (CA 5, 1964), 329 F.2d 687, 688, the circuit court recognized Texas law as applicable to the meaning of an accident policy exclusion relating to aircraft flights and refused to decide such interpretation until the state court had been afforded the opportunity to declare the applicable law. The court did, however, recite several rules applicable herein:

1. Words of limitation contained in a policy will be

strictly construed against the insurer.

2. The question whether ambiguity exists in the language of the contract is one of law.

3. If the language of the contract is clear and unambiguous such meaning must be given to the language as will carry out and effectuate the intentions of the parties, and in that event rules of construction are not to be applied.

4. If ambiguity exists in the contract, construction in accordance with applicable rules is in order.

Here, in view of the trial court's conclusion that the policy provisions are unambiguous, the second and third rules should be applicable, but as will be later seen, the first rule should not be applied.

In *Insurance Co. of N.A. v. General Aviation Supply Co.*, (CA 8, 1960), 283 F.2d 590, 592, the court, applying Missouri law, strictly construed an exclusion excepting from coverage "aviation sales or service or repair organizations" because the claimed insured was "not in sales, service or repair of aircraft, but sold aircraft supplies and equipment." Thus, the language of the exclusion was clear, but the claimed insured's activities were not as a factual matter within the language of the exclusion.

Contrary to appellee's assertion (Br., p. 9), the general rules as to the applicability of rules of construction is stated in 44 C.J.S. Insurance, §297, page 1190, *et seq.*, as follows:

"(2) Limitation of Rule.

“The rule of liberal construction in favor of the insured and strict construction against the insurer applies only where the language of the contract is ambiguous and susceptible of more than one interpretation, and is also subject to the further limitation that such language ordinarily cannot be construed otherwise than according to its plain and ordinary meaning.” (Cf. 29 Am. Jur. Insurance, §§259, 260.)

That this is the law of Washington is beyond doubt. *Jeffries v. General Casualty Co.*, 46 Wn.2d 543, 546, 283 P.2d 128 (1955); *Lawrence v. Northwest Casualty Co.*, 50 Wn.2d 282, 284, 311 P.2d 670 (1957); *Handley v. Oakley*, 10 Wn.2d 396, 408, 116 P.2d 833 (1941); *Howard v. Hollahan*, 182 Wash. 693, 48 P.2d 230; *Samarzich v. Aetna Life Insurance Co. of Hartford, Conn.*, 180 Wash. 379, 40 P.2d 129; *Miller v. Penn. Mutual Life Insurance Co.*, 189 Wash. 269, 64 P.2d 1050; *Kane v. Order of United Commercial Travelers*, 3 Wn.2d 355, 100 P.2d 1036 (1940). And, the language of *Hamilton Trucking Service v. Auto Insurance Company of Hartford, Conn.*, 39 Wn.2d 688, 237 P.2d 781, at page 692, would seem indeed appropriate in the case at bar:

“We have taken the position in such matters that a rule of construction should not be permitted to have the effect to make a plain agreement ambiguous and then construe it in favor of the insured. Our many cases on the subject of interpretation and construction of insurance contracts may be found in Volume 7 of the Washington Digest and Cumulative Annual, Insurance, Key No. 146. We see no occasion to engage in a review of, or to quote from them. The words of the part of the policy under consideration must be accorded their ordinary meaning.

The language used is plain and unambiguous. There is nothing to interpret or construe. We cannot avoid feeling as we read the cases cited by respondent that those courts have created ambiguities where none existed and have then used rules of construction to determine the intent of the parties and what they must have contemplated, thus enlarging the risk coverage of the insurance policies under consideration."

Here, since there is no ambiguity, there is nothing to construe, only to apply. Nevertheless, appellee seeks construction, and "strict" construction, particularly of Exclusion (f). At most appellee argues it was not "leasing" the dock and its use of the dock was "non-exclusive." Assuming the dock was not "rented to" appellee's predecessor at the time of loss it was certainly "occupied by" and "used by" it as those terms are ordinarily understood. Moreover, the dock was under the "care, custody and control" of appellee's predecessor as that clause has been applied in *S. Birch & Sons Construction Co. v. United Pacific Insurance Co.*, 52 Wn.2d 350, 324 P.2d 1073, and *Madden v. Vitamilk Dairy, Inc.*, 59 Wn.2d 237, 367 P.2d 127 (1961); and in accordance the general rule stated in *International Derrick & Equipment Co. v. Buxbaum*, (CA 3, 1957), 240 F.2d 536, 62 A.L.R.2d 1237 annotated; 62 A.L.R.2d 1245, II, §4; 29 Am. Jur. Insurance, §1350, page 466. Appellee does not and cannot challenge the well-settled Washington rule that "a word used in the insurance contract is to be construed in its ordinary signification." *Selective Logging Company v. General Casualty Company*, 49 Wn.2d 347, 301 P.2d 535 (1956), and cases cited at page 351. Also, *Viking Sprinkler Com-*

pany v. Pacific Indemnity Company, 19 Wn.2d 294, 296, 142 P.2d 394 (1943).

Appellee claiming "strict construction" of the Exclusion—(f)—cites *Labberton v. General Casualty Company*, 53 Wn.2d 180, 332 P.2d 228 (1958), and *Brown v. Underwriter's at Lloyds'*, 53 Wn.2d 142, 332 P.2d 228 (1958). While the rule is correct as a general proposition, the reason for the rule as stated in the *Labberton* case, i.e., that the exclusion was drafted by the insurer, completely fails, where, as here, the exclusion was drafted by the Glens Falls Insurance Company—appellee's prior carrier—and requested by appellee. If there was any hidden trap in it whereby appellee sought to delete Exclusion (f) *sub-silencio*, appellee should have said so. The reason for the rule of strict construction demands that in this case Endorsement 23 (Ex. A) be construed *against* the insured. See: 29 Am. Jur. Insurance, §259, page 643.

Under subheading B, appellee argues at page 10 of its brief, that typed parts control over printed parts of the policy. The rule is true, but is applied only where an ambiguity exists or there is some conflict between the typed and printed parts of the policy. Here, the court concluded that no such conflict existed.

The rule applicable is stated in Appleman, Insurance Law and Practice, Volume 13, §§ 7522 (p. 290) and 7537, as follows:

“§7522

“*In construing an insurance policy or certificate, all parts, both printed and written, should be given effect, if possible. In construing insurance contracts,*

the court must take the policy as it finds it, and where it is in printed form with written parts introduced into it, must take the whole together, both written and printed. *Wherever possible, the courts will harmonize such clauses if they can be reconciled by any reasonable construction, since it cannot be assumed that the parties intended to insert inconsistent provisions.*

“Of course, printed parts of a policy may be modified by written endorsement. And the general rule is that while written and printed portions of a policy will be reconciled, if possible, if they are definitely repugnant, the written clauses will be given effect over the printed. Accordingly, where written and printed portions of the policy are inconsistent, the written clauses prevail. The same preference is given to typewritten expression as to one in writing. . . .” (Emphasis added)

(Cf. 44 CJS Insurance, §300, p. 1206; 29 Am. Jur., Insurance, §255. See: *Holthe v. Iskowitz*, 31 Wn.2d 533, 197 P.2d 999 (1948), where rule applied and CJS text, §300, quoted.)

“§7537

“The insurance contract includes the printed form policy, declarations therein, and any endorsements thereto. Provisions of the policy and an endorsement thereon are to be read together. The plaintiff, in an action at law on an automobile policy, must recover, if at all, on the policy as written, including a part of the attached endorsement in fine print.

“In construing an endorsement to an insurance policy, the endorsement and policy must be read together, and the policy remains in full force and effect except as altered by the words of the endorsement. *Where the endorsement expressly provides that it is subject to all terms, limitations and conditions*

of the policy, it does not abrogate or nullify any provision of the policy unless it is so stated in the endorsement.

“As regards rules of construction, an insuring clause and an endorsement limiting protection, both being printed forms with filled in blank spaces, have been held of equal dignity. The policy and endorsement should be construed together unless they are so much in conflict that they cannot be reconciled.” (Emphasis added)

It is again noted that *all* endorsements on Exhibit “A” state; “*All other provisions and conditions remain unchanged.*” But, appellee would have this court read such language out of Endorsement 23, so as to gain the coverage thereof without the limitations of Exclusion (f). The trial court refused to adopt this suggestion, no doubt because it would require an insurer to repeat the major portion of every policy in every endorsement.

In support of this argument, appellee cites *American Universal Insurance Co. v. Kruse*, (CA 9, 1962), 306 F. 2d 661, 665, wherein under Montana law an *oral* contract of insurance was established. Such a contract is forbidden under Washington law. RCW 48.18.190 (claimed by appellee to be not pertinent (Br., p. 15)) requires all contracts of insurance to be in writing.

Appellee also cites and quotes from *Independence Indemnity Co. v. W. J. Jones & Son*, (CA 9, 1933), 64 F. 2d 312, 315-316, wherein the language of a typewritten rider was in conflict and inconsistent with the printed provisions. Of course, the court gave dominant effect to the typewritten provisions as stated in *Appleman*, Insur-

ance Law and Practice, Vol. 13, 5722, page 290, above quoted. But here the typewritten and printed portions of the contract are subject to harmonization and reconciliation without conflict and without inconsistency or ambiguity. The trial court so concluded (R. 73). At least appellee has not suggested wherein any policy provision is in conflict or inconsistent with any other provision.

ANSWER TO APPELLEE'S ARGUMENT CONCERNING PAROL EVIDENCE

(Brief 12, 13)

Appellant objected to parol evidence (Tr. 74) for several reasons which were stated in "Defendant's preliminary memorandum on question of parol evidence" decided favorably to appellant in advance of trial (R. 53) and later rescinded at the commencement of trial (Tr. 3, 8, 56). These reasons are:

(1) The contract including endorsement is plain, clear and unambiguous and not open to construction;

(2) RCW 48.18.190 and Washington decisions interpreting same preclude it.

(3) The contract of insurance, Conditions 16 and 19, Ex. A, preclude it.

(4) The parol evidence rule which is the substantive law of Washington forbids it.

Contrary to appellee's assertion, it is necessary in Washington that the meaning ascribed to language of a contract be doubtful before parol evidence may be received

to implement the agreement. That is the holding of *McKennon v. Anderson*, 49 Wn.2d 55, 298 P.2d 492 (1956), wherein the court discussed the parol evidence rule at page 61 and interpreted the word "we," just as it had approved reception of evidence concerning the words "now manufactured" and "subject to fires" as used in the contract involved in *Leavenworth State Bank v. Cashmere Apple Co.*, 118 Wash. 356, 204 Pac. 5.

And while it is a rule of construction that "surrounding circumstances leading up to the execution of an agreement" are admissible, "not to evidence an intent contrary to that expressed in the agreement, but to place the court in the same position as the parties," *Vance v. Ingram*, 16 Wn.2d 399, 411, 133 P.2d 938 (1943), such rule has never permitted testimony of negotiations leading up to the execution of a written contract under the guise of placing the court in the same position as the parties for the purpose of judicial construction. Here, Mr. Walls' testimony was permitted to go far beyond the range of surrounding circumstances and squarely into his tacit understandings, intentions and interpretations and conversations pertaining to the contracts, as best he could recall after more than six years. This must be illustrative of the reasons why Washington requires all contracts of insurance to be in writing. RCW 48.18.190 so provides and the Washington decisions interpreting same forbid reception of such evidence. In *National Indemnity Co. v. Smith-Gandy, Inc.*, 50 Wn.2d 124, 309 P.2d 742 (1957), the insured called the insurer at 3:15 p.m. on June 7, 1955, to place coverage on a truck in

transit. Unknown to either party, the truck had been involved in an accident one hour earlier. Insured requested retroactive coverage and insurer agreed only to cover from the time of call, 3:15 p.m. The insured confirmed coverage to start at 3:15 p.m., June 7, 1955, by letter. The policy was later issued showing commencement of coverage at 12:01 a.m., June 7. The insurer sought to introduce insured's letter of confirmation of coverage to which insured objected. Citing RCW 48.18.190, the Supreme Court held the letter of confirmation inadmissible.

In *Western Casualty & Surety Co. v. Harris Petroleum Co.*, U.S.D.C. SD Calif., Central Div. (1963), 220 F. Supp. 952, the question arose as to whether an automobile owned by Harris Petroleum and involved in a fatal accident was within liability insurance policy covering "all owned automobiles." The specific vehicle was not listed in the policy and correspondence indicated that neither the insurer nor the insured intended it to be covered because of the insured's desire to reduce its premium payment. The court held the vehicle to be covered, applying Washington law, distinguishing certain Washington cases and deciding that *National Indemnity Co. v. Smith-Gandy, Inc.*, *supra*, controlled so as to preclude the admissibility of previous policies and correspondence between the insured and insurer.

Appellee says these cases "deal with attempts to vary or change terms of the insurance policies, rather than to determine the intention of the parties and to explain uncertainties." It is clear that Mr. Walls misinterpreted Exclusion (f), Ex. A, as precluding coverage only for

“owned” property rather than property also occupied by, rented to, used by and under the care, custody and control of appellee’s predecessor.

It may be conceded that Mr. Walls attempted to explain the word “used” (Tr. 111, ll. 2-5), but how often does one operate a barge across a bridge? His interpretation in this regard is inconsistent with that most favorable to the insured as stated in *Smith v. Northern Pacific Ry. Co.*, 7 Wn.2d 652, 110 P.2d 851, 854, quoted in appellant’s opening brief at page 16.

Mr. Walls’ testimony concerning conversations with the broker, Fleming, and later Frederickson and Hackbarth, leading up to the issuance of the insurance contract were something more than an explanation of surrounding circumstances and to explain undisclosed uncertainties. They were negotiations and conversations prior to the issuance of Endorsement 23 and merged therein. It is just this type of thing that the parol evidence rule, the Washington statute and decisions interpreting same, and Conditions 16 and 19 of the insurance contract (Ex. A; quoted at pp. 18, 19 of appellant’s opening brief) are intended to prevent.

For these reasons, the court should have sustained appellant’s objection to appellee’s offer of proof, particularly paragraphs 2 through 7 (Tr. 5, ll. 2-7, l. 19) instead of reserving ruling thereon (Tr. 8, ll. 1-4) and subsequently considering the testimony offered in support thereof.

CONCLUSION

Endorsement 23 and Exclusion (f) having been determined by the court to be plain, clear and unambiguous, and the former not affecting the latter, both should have been applied in harmony to the entire loss. So applied Endorsement 23 covered the claims of approximately \$7,000.00 of other parties, including a claim by Tidewater-Shaver Barge Lines, Inc., for damage to the structure of the Barge *Onandaga* (R. 33, ll. 13-16) paid by appellant because such *property* was not excepted under Exclusion (f). But because the destroyed dock which was the subject of the Port of Pasco claim, was "occupied by, rented by or used by" appellee's predecessor or under its "care, custody and control," and property as to which it "exercised actual physical control," the claim for destruction of such *property* was excepted; payment therefore being properly refused by appellant.

Since the pertinent policy provisions are plain, clear and unambiguous, the court erred in receiving parol evidence over appellant's objection because

(1) the parol evidence rules bar it;

(2) RCW 48.18.190 and the Washington decisions thereunder forbid it; and

(3) Conditions 16 and 19 of the insurance contract forbid it.

Even if it be assumed that parol evidence was admissible, such does not support the challenged findings of fact, conclusions of law and judgment.

When the question is considered whether or not the particular property destroyed is covered under Endorsement 23 and Exclusion (f), applied in harmony, the answer can only be negative. In the *absence* of Exclusion (f) — as appellee suggests — the specific property would be covered. But it is extremely difficult to arrive at the proper conclusion while using terms as vague and nebulous as “third party liability risks” which are entirely foreign to the contract involved and can only result in confusion.

To illustrate, if appellee was occupying, renting or habitually using a building and ran into it with an automobile, appellee would claim coverage under the policy for its liability to the owner, notwithstanding the clear exception in Exclusion (f).

Likewise, if appellee borrowed an automobile, collided, and was liable to the owner for damage, appellee would claim coverage under this policy, rather than the collision coverage of the owner.

In short, appellee seeks full property insurance as well as liability insurance under the one contract for the latter and payment of the single premium therefor. In order to do so appellee must read out of the contract Exclusion (f) either in its entirety, as suggested, or at least partially, by construction, so that Exclusion (f) would read:

“This policy does not apply: . . .

“(f) under Coverage C, to injury to or destruction of (1) property owned . . . by . . . the insured . . . (2) . . . (3) . . . (4) . . .”

Such interpretation under the guise of construction amounts to nothing more than a judicial re-writing of the contract. Rather, this court should apply the policy as a whole to the property destroyed thereby giving effect to each and every clause of the contract and the intentions of both parties evidenced thereby. Such application requires that the judgment be reversed in favor of appellant and that this case be dismissed because appellee's admissions concerning the character, nature and extent of its use and occupancy of the destroyed property (R. 37, l. 1; R. 38, l. 25; Tr. 65, l. 1-Tr. 67, l. 4; R. 62, ll. 15-17) clearly preclude coverage under Exclusion (f), Ex. A, as written.

Respectfully submitted,

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CERTIFICATE

I certify that, in connection with the preparation of this brief, I have examined Rules 18 and 19 of the United States Court of Appeals for the Ninth Circuit and that, in my opinion, the foregoing brief is in full compliance with these rules.

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